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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VICTORIA BUCKLEY, COLORADO SECRETARY OF STATE,
Petitioner,

v.

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., *et al.*,
Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF COLORADO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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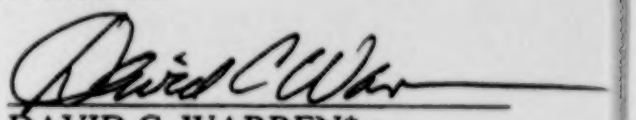
The American Civil Liberties Union and American Civil Liberties Union of Colorado (collectively the "ACLU") move for leave to file a brief as *amici curiae*. The issues to be decided herein affect the interests of the organizations, as set forth in the accompanying brief.

Petitioner and Respondents each initially granted oral consent to the filing of this brief. Respondents subsequently

withdrew their consent, and Petitioner has not responded to the ACLU's request for a letter of consent.



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INTEREST OF *AMICI*[1]

The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Colorado is one of its statewide affiliates. In support of these principles, these organizations (collectively the "ACLU") have appeared before this Court in numerous First Amendment cases, including *Meyer v. Grant*, 486 U.S. 414 (1988), both as direct counsel and as *amici curiae*. Because this case addresses important First Amendment questions, its proper resolution is a matter of substantial concern to the ACLU and its members.

STATEMENT OF THE CASE[2]

Since 1910, the Colorado Constitution has reserved to the citizens of Colorado the right to enact legislation directly through the initiative process. Colo. Const. art. V, § 1. Pursuant to authority granted by the state constitution, the Colorado legislature has periodically enacted regulations governing the initiative process. *See* Colo. Rev. Stat. §§ 1-40-101 to 1-40-133 (1997).

One such regulation requires initiative proponents to submit a minimum number of signatures in order to place a measure on the ballot. *See* § 1-40-109. Until 1980 proponents could use either paid or volunteer petition circulators to meet this minimum. That changed in 1980 when the Colorado legislature made the payment of petition circulators a felony for the first time. *See* Colo. Rev. Stat. § 1-40-110 (repealed 1989). This Court, however, struck

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[1] Pursuant to Rule 37.6, no counsel for any party had any role in authoring this brief. Counsel for *amici* authored this brief in whole, and no entity other than the named *amici curiae* or their counsel have made any monetary contribution to the preparation or submission of this brief.

[2] Opinions of the lower courts are cited to the appendix of the State's petition for certiorari ("Pet. App."). Transcript citations are noted as "T.1" and "T.2" for day 1 and 2 of trial, respectively. Petitioner's Brief is cited as "Pet. Br.", and the *amicus curiae* brief of various organizations of local governments as "Local Gov'nt Assocs. Br."

down the ban on paid circulators in *Meyer v. Grant*, 486 U.S. 414 (1988), holding that it constituted an unjustified burden on "core political speech," a violation of the First Amendment. *Meyer v. Grant*, 486 U.S. 414 (1988). Just five years later, the Colorado General Assembly passed additional restrictions on the initiative and referendum process, some of which were again targeted specifically at proponents of ballot measures who use paid petition circulators. *See* S.B. 93-135, 59th G.A., 1st Reg. Sess. (Colo. 1993).

Respondents are individuals who participate in the initiative and referendum process in various roles.[3] They filed this action in the United States District Court for the District of Colorado against the Colorado Secretary of State (the "State" or "Colorado") challenging the constitutionality of several of the regulations.

Specifically, Respondents challenged the registration requirement, set forth in § 1-40-112(1), which requires all initiative petition circulators to be registered Colorado voters. They challenged the badge requirement set forth in § 1-40-112(2), which requires petition circulators to wear badges disclosing: (a) their names, (b) whether they are paid or volunteer, and (c) in the case of paid circulators, the name and telephone number of their employer. And, respondents challenged the reporting requirements of § 1-40-121, which requires initiative proponents to submit two types of financial disclosures. First, § 1-40-121(1) requires proponents to file a report at the same time they file their completed initiative petition with the Secretary of State (the "final report"), disclosing the name, address, county of voter registration and amount paid to each individual circulator as

[3] For example, Respondent American Constitutional Law Foundation, Inc. ("ACLF") is a non-profit, public interest organization that supports direct democracy. (Pet. App. A-20 - A-21.) At the time of trial, John Baraga circulated petitions for the Colorado Hemp Initiative and was the statewide petition coordinator for that organization. (Pet. App. A-21.) Bill Orr is a Colorado resident, but not a registered voter, who regularly participates in the petition process as a proponent and circulator. (*Id.*)

well as the amount paid per signature. Second, § 1-40-121(2) requires proponents to prepare and submit a report to the Secretary of State each month during a petition drive (the "monthly report") including the names of proponents, the name of the proposed ballot measure, the name of each paid circulator, the home and business addresses of every circulator, and the amount of money paid and owed to each the preceding month. A willful violation of any of these provisions is punishable by fine, imprisonment, or both. §§ 1-40-130(1)(h), 130(2), 132(1).

Following a two-day evidentiary hearing, the district court granted partial relief. Judge Matsch invalidated the badge requirement, finding that "[t]he plaintiffs have adequately demonstrated that compelling circulators to wear identification badges inhibits participation in the petitioning process," and that "this requirement burdens core political speech." (Pet. App. B-20.) The district court also struck down the monthly report requirement in full. As Judge Matsch noted, the evidence demonstrated that "[p]reparation of the monthly report is burdensome and involves an additional expense to those supporting an initiative or referendum petition. The testimony presented shows that the monthly reports affect the circulation process and therefore the amount of core political speech." (*Id.* at B-24.) For similar reasons, Judge Matsch struck down those portions of the final report requirement that mandated disclosure of the name and address of the individual circulators. Like the monthly report, the final report "prevents anonymity of the circulators and thus exposes them to intimidation, harassment and retribution in the same manner as the badge requirement." (*Id.* at B-23.)

The district court was equally clear in describing the impact of the registration requirement on First Amendment rights. "[It] limits," Judge Matsch wrote, "the number of persons available to circulate and sign these petitions, and accordingly, restricts core political speech." (Pet. App. B-22.) Judge Matsch nevertheless upheld the registration

requirement on the theory that it was somehow less vulnerable to a First Amendment challenge because it was enacted directly by the voters rather than by the legislature. (*Id.*)

The Tenth Circuit, in *American Constitutional Law Foundation v. Meyer*, 120 F.3d 1092 (1997) affirmed the district court's opinion relating to the badge and reporting requirements and reversed as to the registration requirement, holding that it too violates the United States Constitution. (Pet. App. A-30, 37, 41.)[4] This Court granted the State's petition for certiorari to determine whether Colorado's registration, badge, and reporting requirements unduly burden rights guaranteed by the First and Fourteenth Amendments.[5]

SUMMARY OF THE ARGUMENT

Ten years after the *Meyer* Court unanimously declared Colorado's prohibition against paid initiative circulation unconstitutional because it unnecessarily burdened "core political speech," the State is again defending unjustified limitations on the same fundamental expression. The State attempts to distinguish *Meyer* by arguing that the statutory provisions at issue here merely regulate the electoral process and do not burden political speech. Whatever the merits of the State's view that the initiative and referendum process contains "procedural" as well as "expressive" components, after *Meyer* there can be no doubt that advocacy by petition circulators falls squarely within the latter category, and that regulations which have

[4] The State did not request a stay of the Tenth Circuit's order, and the State apparently is not currently enforcing the regulations at issue.

[5] Other aspects of the lower court rulings are not before this Court, including their decisions upholding: mandatory disclosures in the final report of the name and expenditures of an initiative proponent, the requirement that petition circulators be at least 18 years of age, deadlines for the submission of initiative petitions, and a requirement that circulators attach an affidavit to each set of signatures submitted attesting to the validity of those signatures.

the effect of limiting such advocacy are invalid unless they survive exacting scrutiny.

The registration, badge and reporting requirements at issue here hinder core political speech in the same ways as the provision invalidated in *Meyer*: each reduces the pool of available circulators directly or indirectly, thereby reducing the public discourse that takes place about a given ballot measure and simultaneously impeding a proponent's ability to garner enough support to place his proposed legislation on the ballot. While the registration requirement directly and dramatically decreases the number of people available to serve as circulators, the badge and reporting requirements discourage citizens from participating in the circulation process by forcing them to consent to personal and irrelevant disclosures.

The challenged regulations are not necessary to serve -- and some do nothing even to advance -- any compelling state interest. Although the State has an interest in maintaining the "integrity" of the initiative and referendum process, the State's interest in avoiding signature fraud (urged by the State as a justification for all of the regulations at issue) is satisfied today by the same regulations the *Meyer* Court found sufficient ten years ago. Tellingly, in the decade that has passed since *Meyer*, the State has still been unable to produce evidence that signature fraud is anything more than a conjectural problem in Colorado.

As with signature fraud, the State's other asserted interests are constitutionally deficient because the State has failed to support them with the required evidence. Even if it had, the regulations would nevertheless be unnecessary because the State's objectives are satisfied through other existing laws.

The State has presented no proof that its interest in enforcing generally applicable laws, such as laws against fraud, requires it to impose registration and badge requirements on petition circulators that it does not impose

on anyone else. Similarly, the reporting requirements are not narrowly tailored to ensure that voters are educated about what types of groups and individuals will benefit from a proposed initiative. Colorado already requires proponents to make comprehensive disclosures about money spent to support any given ballot measure; disclosure of personal information about paid circulators adds little, if anything, of relevance to voters' abilities to judge the merits of a ballot measure. Neither can disclosures about the amount of money *paid to* petition circulators be justified by analogy to statutes requiring disclosure of amounts *contributed by* individuals to candidates. Moreover, this Court has repeatedly recognized that expenditures to further discussion of issues do not pose the risks of corruption present in the candidate election context.

There is no dispute that the State has an interest in maintaining the integrity of the process by which ballot measures are enacted into law. However, that interest does not justify regulations whose effect and apparent purpose is to discourage and discredit those who advocate support for such measures. The registration, badge and reporting requirements do not promote the State's effort to protect the initiative and referendum process from fraud, but they do unnecessarily restrict the ability of the people to communicate with fellow citizens to effect changes in the law.

ARGUMENT

I. UNDER *MEYER V. GRANT*, THE CHALLENGED REGULATIONS UNCONSTITUTIONALLY BURDEN CORE POLITICAL SPEECH WITHOUT NARROWLY PROMOTING A COMPELLING STATE INTEREST.

A. Because The Regulations At Issue Burden Core Political Speech, They Must Be Judged By Strict Scrutiny.

This Court unanimously held in *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988), that Colorado's ban on paid petition circulators was unconstitutional because it unnecessarily limited the ability of initiative and referendum supporters to engage in "core political speech," for which First Amendment protection is "at its zenith." Contrary to the State's assertion that it "jealously protects" the initiative and referendum process, (Pet Br. at 18, 23, 45), the State is once again before the Court defending unnecessary burdens on petition circulation -- particularly *paid* circulation -- and resurrecting some arguments expressly rejected in *Meyer*.

Despite its efforts to distinguish the regulations at hand, the State cannot escape the controlling effect of *Meyer*. Like a ban against paid circulators, the registration, badge and reporting requirements impose unwarranted difficulties on citizens seeking to utilize the initiative and referendum process as a means of political expression. Accordingly, as it did in *Meyer*, the Court should apply strict scrutiny to the regulations at issue.

1. The Regulations Burden Petition Circulators In Their Role As Citizen-Advocates.

The State attempts to distinguish the regulations at hand from the prohibition struck down in *Meyer* on the grounds that these provisions "address an entirely different dimension of the initiative process: the electoral procedures

by which initiatives are qualified for the ballot." (Pet. Br. at 17.) To this end, the State argues that the challenged provisions are directed at petition circulators' quasi-official administrative role, rather than their role as citizen advocates. (Pet. Br. at 24-25, 39-40.) The State's argument is flawed in two respects.

First, the State characterizes petition circulators as voluntary public officials acting on behalf of the State, and ignores their role as citizen-advocates. The only thing that distinguishes petition circulators from people who stand on street corners or in parks expressing their views to passersby is that petition circulators ask for more than the listener's ear -- they also ask for a signature. In collecting signatures, circulators are not acting on behalf of the State, but rather on behalf of themselves and other private citizens. Though they must adhere to generally applicable laws regulating public conduct, such as assault, defamation, or indecency, they are not subject to any and all rules the State might impose on employees of the Office of the Secretary of State as a condition of employment.

Second, the State blurs the distinction between laws that set forth procedures for the orderly administration of the initiative and referendum process and those that decrease citizens' ability to communicate through this process. The former category is exemplified by § 1-40-116, which sets forth procedures for verifying petition signatures before they are counted toward the number needed to place an issue on the ballot. Truly procedural regulations such as this do not interfere with the circulator's role as advocate and may warrant a different level of scrutiny.

However, the Court's opinion in *Meyer* establishes that those laws which restrict the advocacy necessary to gather support for a ballot measure operate in the "protected speech" and not the "procedural" category of the initiative and referendum process. The *Meyer* Court explained why

the circulation of initiative petitions constitutes political expression as follows:

> The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as "core political speech."

486 U.S. at 421-22 (footnotes omitted).

Because a petition circulator is engaging in the expression of political and social ideas, the First Amendment must afford him the broadest protection in order "'to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Meyer*, 486 U.S. at 421 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Indeed, "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). *See also Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government").

For this very reason, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) and *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), the Court struck down statutes limiting the amount of money that could

be contributed to support or oppose initiatives and referenda. In *Bellotti*, the Court characterized money spent to oppose enactment of a graduated income tax ballot measure as "the type of speech indispensable to decisionmaking in a democracy." 435 U.S. at 777. In *City of Berkeley*, the Court explained that limitations on contributions to influence the outcome of a rent control referendum restricted the "marketplace for the clash of different views and conflicting ideas." 454 U.S. at 295.

Moreover, the often controversial nature of many initiatives and referenda warrants special protection for advocacy of such measures.[6] In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), Mrs. McIntyre was prosecuted for distributing unsigned leaflets advocating a controversial school tax proposal. The Court stated:

> [T]he speech in which Mrs. McIntyre engaged -- handing out leaflets in the advocacy of a politically controversial viewpoint -- is the essence of First Amendment expression. *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *Lovell v. Griffin*, 303 U.S. 444 (1938). That this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to Ms. McIntyre's expression. . . .

514 U.S. at 347 (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

Like deregulation of the trucking industry in *Meyer*, the graduated personal income tax in *Bellotti*, and rent control in *City of Berkeley*, Colorado's Safe Workplace

[6] *See* Richard B. Collins & Dale Oesterle, "Structuring the Ballot Initiative: Procedures that Do and Don't Work," 66 U. Colo. L. Rev. 47, 49 (1995) ("Public discussion of the initiative process focuses almost exclusively on the content of controversial measures"). *See generally*, David E. Watson, "'Be It Enacted By the People of the State of Kansas' -- Is It Time for Kansas to Adopt Ballot Initiatives?," 37 Washburn L.J. 383 (1998) (arguing for initiative legislation as an alternative avenue for enacting controversial laws).

Initiative in this case involves "a matter of societal concern that appellees have a right to discuss publicly without risking criminal sanctions." *Meyer*, 486 U.S. at 421. Like Mrs. McIntyre's leaflets discussing a heated tax issue in her community, circulators and proponents of the Colorado Hemp Initiative advocate one of the country's most hotly disputed issues, the legalization of marijuana for certain purposes.

Accordingly, Judge Matsch applied *Meyer* and found that each of the challenged regulations burdens "core political speech." (Pet. App. B. 20-24.) His findings of fact are supported by the evidence[7] and should not be disturbed despite the State's argument that the regulations merely set forth electoral procedures and do not burden speech.

2. Strict Scrutiny Measures The Constitutionality Of Burdens On Political Expression

In *Meyer*, the Court concluded that restrictions on the petition circulation process impose a limitation on speech subject to "exacting scrutiny." 486 U.S. at 420. Likewise, the Court applied strict scrutiny to limitations on corporate expenditures to influence the outcome of ballot measures because such restrictions are "directed at speech itself, and the speech is intimately related to the process of governing." *Bellotti*, 435 U.S. at 786 (footnote omitted). *Accord City of Berkeley*, 454 U.S. at 298.[8]

[7] *See infra* at 17, n. 20 and n. 25.

[8] Similarly, where regulations limit election-related discussion in contexts other than initiatives and referendum, the Court applies strict scrutiny and not the test the *McIntyre* Court labeled the "ordinary litigation" test. *E.g.*, *McIntyre*, 514 U.S. at 347 (1995) (prohibitions on circulation of anonymous leaflets discussing election issue); *Brown v. Hartlege*, 456 U.S. 45, 54 (1982) (restrictions on candidate's campaign promises); *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976) (expenditure limits in support of a candidate). *See also Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632, 637 (applying strict scrutiny to limitations of charitable solicitation, which involves "'informative and perhaps persuasive speech seeking support for particular causes or for

Essentially calling for the Court to overrule *Meyer*, *Bellotti*, and *City of Berkeley*, the State argues that the Court should judge the regulations at issue using the more lenient standard of review employed in *Timmons v. Twin Cities Area New Party*, 117 S.Ct. 1364 (1997), *Burdick v. Takushi*, 504 U.S. 428 (1992), *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Storer v. Brown*, 415 U.S. 724 (1974).[9] The State acknowledges this Court has never applied the "flexible election law standard" to the initiative process. (Pet. Br. at 27.) Its argument that the Court should do so now is based on the mistaken premise that ballot access regulations are no different from statutes regulating the circulation of initiative and referendum petitions because both "control the mechanics of the electoral process." (Pet. Br. at 29.)

This Court expressly rejected a similar argument in *McIntyre*, where it refused to apply what it labeled the "ordinary litigation" test of *Storer* and its progeny to a regulation that prohibited the distribution of anonymous handbills. The Court stated:

> The "ordinary litigation" test does not apply here. Unlike the statutory provisions challenged in *Storer* and *Anderson*, [the challenged regulation] does not control the mechanics of the electoral process. It is a regulation of pure speech. . . . Consequently, we are not faced with an ordinary election restriction; this case "involves a limitation on political expression subject to exacting scrutiny." *Meyer v. Grant*, 486 U.S. 414, 420 (1988).

514 U.S. at 345-46. The *McIntyre* Court's reliance on *Meyer* as an example of the type of speech to which the "ordinary litigation" standard would *not* apply establishes that that test is not applicable in this case, which involves the same political speech as *Meyer*.

The State's position ignores the fundamental, constitutionally relevant distinctions this Court has made between two very different areas of the law. Each of the cases the State points to as a basis for applying this less stringent standard of review involved candidates' qualifications to be placed on the ballot--not election-related expression. *See, Timmons*, 117 S.Ct. at 1367; *Burdick*, 504 U.S. at 430; *Anderson*, 460 U.S. at 782-83; and *Storer*, 415 U.S. at 726-27.

Indeed, the Court unambiguously held in the most recent of these cases that, unlike petition circulation, ballot access cases do not involve limitations on "core political expression." *See Timmons*, 117 S.Ct. at 1372. The *Timmons* Court explained that "[b]allots serve primarily to elect candidates, not as fora for political expression," and thus the ballot access regulations at issue did not regulate "core associational activities." 117 S.Ct. at 1370, 72.

This holding echoed a sentiment unanimously expressed in *Burdick*, where the majority stated that "the function of the election process is 'to winnow out and finally reject all but the chosen candidates' . . . . Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." 504 U.S. at 438 (quoting *Storer*, 415 U.S. at 730, 735). In his dissenting opinion, Justice Kennedy

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particular views on economic, political, or social issues.'"), *quoted in Meyer*, 486 U.S. at 422 n.5.

[9] The less demanding test set forth in these cases requires weighing of:

> the "'character and magnitude'" of the burden the State's rule imposes on [associational or voting] rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "'important regulatory interests'" will usually be enough to justify "'reasonable, nondiscriminatory restrictions.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788; *Norman v. Reed*, 502 U.S. 279, 288-89 (1992) (requiring "corresponding interest sufficiently weighty to justify the limitation")).

Timmons, 117 S.Ct. at 1370 .

"agree[d] with the first premise in the majority's legal analysis. The right at stake here is the right to cast a meaningful vote for the candidate of one's choice. Petitioner's right to freedom of expression is not implicated." *Id.* at 445.

This fundamental distinction between the ballot access cases and the case at bar is fatal to the State's claim that this case should be governed by the "ordinary litigation" test of *Storer* and its progeny.[10] Rather, as it has consistently done in ballot measure and analogous cases involving regulations of fundamentally protected speech, the Court should evaluate the challenged statutory provisions by applying strict scrutiny.[11]

The analysis is the same regardless of whether the regulations impact paid or volunteer circulators. As this Court observed two decades ago: "It is too late to suggest 'that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.'" *Bellotti*, 435 U.S. at 786, n. 23 (quoting *Buckley v. Valeo*, 424 U.S. 1, 16 (1976)).

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[10] Both *City of Berkeley* and *Bellotti* were decided subsequent to *Storer*, and *Meyer* was decided after both *Storer* and *Anderson*. Yet in none of the Court's ballot measure speech opinions -- *Meyer, City of Berkeley* or *Bellotti* -- did the Court even suggest that a standard of review less demanding than strict scrutiny might be appropriate in other circumstances involving expressive components of the initiative and circulation process.

[11] Most lower federal courts have correctly applied strict scrutiny, and not the diminished standard proposed by the State, to restrictions on expression in the initiative and referendum process. *See, e.g., Bernbeck v. Moore*, 126 F.3d 1114 (8th Cir. 1997) (regulation requiring circulators to be registered voters); *Jews for Jesus v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319 (1st Cir. 1993) (ban on all non-commercial expressive activity in subway stations, including petition circulation); *Term Limits Leadership Council v. Clark*, 984 F.Supp. 470 (S.D. Miss. 1997) (regulations requiring circulators to be qualified electors and prohibiting per-signature payments of circulators); *LIMIT v. Maleng*, 874 F.Supp. 1138 (W.D. Wash. 1994) (regulation prohibiting per-signature payment of circulators).

B. The Regulations At Issue Are Not Necessary To A Compelling State Interest.

In order for a regulation to survive strict scrutiny, this Court requires the government to demonstrate that the statute is necessary to achieve a compelling state interest. *See, e.g., Bellotti*, 435 U.S. at 786. In meeting its burden, the State cannot rely upon mere supposition or speculation, but rather must come forward with specific evidence sufficient to support this interest.[12] *See Bellotti*, 435 U.S. at 789. *See also Meyer*, 486 U.S. at 426 (State "failed to demonstrate" regulation was necessary to a compelling interest where "[n]o evidence ha[d] been offered to support that speculation"); *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way'") (citation omitted) (plurality opinion). For a host of reasons, the State's regulations fail this test.

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[12] The Court should consider any legislative findings in this case against the self-interests of local government officials: the initiative and referendum process allows individual citizens to influence and shape the law in ways that are sometimes directly adverse to the views or interests of those officials. *See, e.g.*, Colo. Const. art. 4, § 1(2), art. 5, § 3(2), art. 18, § 11 (constitutional amendments enacted by initiative limiting terms of the Colorado executive department, senators and representatives and local officials). *See also Bellotti*, 435 U.S at 777 n.11 ("Freedom of expression has particular significance with respect to government because 'it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.'") (citation omitted). *Cf. Colorado Republican Fed. Campaign Comm. v. F.E.C.*, 518 U.S. 604, 644 n.9 (1996) (Thomas, J., dissenting in part) (suggesting that deference to the legislature on questions of campaign finance reform "poses great risk to the First Amendment, in that it amounts to letting the fox stand watch over the henhouse . . . . What the argument for deference fails to acknowledge is the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it").

1. Other Regulations Preserve The Integrity Of The Initiative Process.

As an overriding justification for all three regulations, the State offers its interest in "preserv[ing] the integrity of the [initiative] process," or, more specifically, preventing signature fraud. (Pet. Br. at 24-25.) The *Meyer* Court squarely rejected this argument on a record almost identical to this one. In *Meyer*, the Court dismissed the State's argument that the regulation was necessary to avoid signature fraud on the ground that "[n]o evidence ha[d] been offered to support that speculation." 486 U.S. at 426. Ten years later, the State is still just speculating: the State admits that there have been no "definitive studies" on fraud in the initiative process since *Meyer*, (Pet. Br. at 21), even though the number of ballot measures initiated have greatly increased since then, (Pet. Br. at 4, 5).[13]

Moreover, the *Meyer* Court concluded that the very regulations in force in Colorado today were "adequate to the task of minimizing the risk of improper conduct in the circulation of a petition." 486 U.S. at 426-27. In addition, a year after *Meyer* was decided, the state added a requirement that every circulator print his name and address on an affidavit attached to each set of signatures submitted, thereby allowing the state to locate him if a question as to the validity of any signature arises. *See* § 1-40-111(2).[14] Thus, absent evidence that the situation since *Meyer* has changed

[13] The State's and supporting *amici's* own source for the proposition that the fraud is a valid concern in the petition process concedes that there is merely "fragmentary" evidence that paid petition circulators submit more invalid signatures that volunteer petition circulators. *See*, Daniel Hays Lowenstein & Robert M. Stern, "The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal," 17 Hastings Const. L.Q. 175, 189 (1989). Thus, any argument that the regulations targeted at paid circulators (i.e., reporting requirements) are especially warranted by this interest also fails.

[14] The affidavit requirement also compels each circulator to swear, under penalty of perjury, that he is familiar with the laws applicable to the circulation of petitions, that to the best of his knowledge each signature is valid, and that he has not paid anyone to sign the petition.

for the worse, additional regulations aimed at avoiding signature fraud are still unnecessary. Indeed, as shown below, the challenged regulations do not advance this interest in any meaningful way.

2. The Challenged Regulations Fail To Narrowly Serve Any Other Legitimate State Interest.

a. The Registration Requirement.

The *Meyer* Court explained two ways in which Colorado's exclusion of paid workers from the pool of potential initiative petition circulators restricted the First Amendment rights of those groups or individuals seeking to collect sufficient signatures to place an initiative on the ballot:

> First, it limits the number of voices who will convey [the proponents'] message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that [proponents] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.

486 U.S. at 422-23 (footnote omitted).

The prohibition against the use of anyone but Colorado registered voters to circulate petitions operates in exactly the same way: a "voter only" pool of circulators means there are fewer people available to circulate petitions, so fewer people have an opportunity to sign petitions and the likelihood proponents will be able to place their issue on the ballot decreases. As the State concedes, the registration requirement excludes a minimum of 400,000 otherwise-qualified Colorado residents from the pool of circulators. [15]

[15] The State suggests the exclusion of these potential circulators is irrelevant because nearly 2 million people do satisfy the registration requirement. The Court rejected a similar argument in *Meyer*, where it

(Pet. Br. at 33; Pet. App. G-1 - G-2.). Thus, the district court found that "[t]he record does show that the requirement of registration limits the number of persons available to circulate and sign these petitions, and accordingly, restricts core political speech." (Pet. App. B-22.)[16]

An equally troubling aspect of the registration requirement is that it excludes potential circulators residing *outside* of Colorado as well. The State's supporting *amicus* notes that professional paid circulators often travel from state to state collecting signatures for various ballot measures. (*See* Local Gov'nt. Assocs. Br. at 7.) If it is reasonable to expect that professional circulators will be the best at obtaining signatures, then the State's prohibition on use of non-Coloradans to circulate petitions directly forecloses initiative and referendum supporters from using "the most effective means" to advocate their cause, as they are entitled to do under *Meyer*. 486 U.S. at 424.

The State's asserted interests do not justify this result. As explained above, signature fraud is a concern that is adequately addressed through other, unchallenged measures. Moreover, the State did not present any evidence that non-voting Coloradans or non-Coloradans were more likely to engage in signature fraud than registered voters. To the contrary, a witness for the State testified that during a period

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stated: "That [the regulation] leaves open 'more burdensome' avenues of communication, does not relieve its burden on First Amendment expression." 486 U.S. at 424 (quoting *F.E.C. v. Massachusetts Citizens For Life*, 479 U.S. 238 (1986)).

[16] Although the District court found that this regulation burdened core political speech, it concluded that because the United States Constitution does not guarantee the right of initiative and referendum, the People (who enacted this measure through a referendum) were free to limit the right in any way they choose. (Pet. App. B-22.) This view was rejected in *Meyer*. *See* 486 U.S. at 424-45 (power to ban initiatives does not include power to limit discussion of political issues raised in initiative petitions. *Accord City of Berkeley*, 454 U.S. at 437 ("voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation"). *Cf. Wabaunsee County v. Umbehr*, 518 U.S. 668, 674-75 (1996) (reaffirming "unconstitutional conditions" doctrine).

in which the enforcement of the registration requirement was stayed pursuant to a court order, twice as many registered voters as non-registered voters were the targets of fraud prosecutions. (T. 2. at 115.)[17]

The State argues that the registration requirement is justified because it also ensures the State will have the power to enforce its laws against those who engage in signature fraud, and that regulations prohibiting fraud and forgery on petitions are "meaningless unless they can be enforced." (Pet. Br. at 32.) Indeed, *any* law is meaningless unless it can be enforced, but the State has not even attempted to show that it has a greater problem punishing petition circulators for signature fraud than those who violate other Colorado laws. Imposing a registration or even a residence requirement on these facts would justify similar requirements on all non-residents entering Colorado, given the chance that they might break libel or fraud laws and escape prosecution.[18] This kind of blanket exclusion is especially unjustifiable where the effect is a restriction on core political expression.[19]

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[17] Neither is this regulation justified by the interests that allow residency requirements for voters. Petition circulators are merely the people who make voters aware of the proposed legislation -- only registered voters (and thus, Colorado residents) can provide the signatures necessary to put an initiative on the ballot, and only they can vote a measure into law. Thus, the State's interest in "preserv[ing] the basic conception of a political community" is unaffected by the use of non-resident circulators. *See Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972).

[18] The registration requirement would fail even under the "ordinary litigation" test due to its exclusionary effect and the State's failure to present any legitimate reason to exclude non-residents. *See Timmons*, 117 S.Ct. at 1370 ("reasonable, *nondiscriminatory*" regulations are justified by "important" interests) (emphasis added).

[19] The State's additional arguments are beside the point. It is irrelevant to the constitutionality of the registration requirement that it is easy to register to vote (although it obviously is not easy for non-residents, and not registering to vote is itself a form of political expression for some (*see* T.1 at 223)), or that other regulations unconnected to the initiative and referendum process impose registration requirements (if they unduly burden protected expression, they too are unconstitutional). Even more puzzling is the State's suggestion that simply because it has a legitimate reason for requiring that petition *signers* be registered voters it follows that a similar requirement for *circulators* is acceptable. Finally, the fact that the State reduced the number of signatures required to get a measure

b. The Badge Requirement.

Like the prohibition struck down in *Meyer*, the badge requirement doubly burdens protected expression. First, the badge deters individuals from becoming petition circulators because it deprives them of the right to engage in speech anonymously, without fear of retaliation or harassment. Second, because some circulators are unwilling to circulate petitions if required to wear a badge, this regulation limits a proponent's ability to access the ballot.

Name Disclosure

The requirement that the badge reveal the circulator's name deters circulation (and thus burdens political expression) because it prevents circulators from anonymously communicating their support for a given initiative or referendum. In *McIntyre*, this Court spoke out strongly in support of the right to anonymous speech when it struck down a statute that prohibited distribution of anonymous leaflets addressing issues being voted upon in an upcoming election. The Court stated:

> [t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment."

514 U.S. 341-42 (footnote omitted).

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on the ballot from 8% to 5% when it imposed the registration requirement does not eliminate the burden on speech that takes place during the circulation process.

This reasoning applies with equal force in the context of initiative petition circulation, where the risk of immediate, "heat of the moment" harassment and retaliation is at its greatest. The petition circulator opens himself up to the risk of instant, personal hostility in the same way as an author distributing leaflets on a controversial subject. Moreover, the petition circulator's speech necessarily involves interaction with listeners, perhaps even more than a leaflet distributor, as a circulator seeks to persuade the listener to sign the petition. Thus, as in *McIntyre*, the Court should reject a requirement that the circulator give up this remaining measure of privacy.

Based on the evidence,[20] the district court found that "compelling circulators to wear identification badges inhibits participation in the petitioning process," and that therefore "this requirement burdens core political speech." (Pet. App. B-20.) Nevertheless, the State argues that the badge requirement is a reasonable regulation of the electoral process because badges are necessary to identify circulators who harass potential signers or engage in some other unspecified "fraud" in the process of gathering signatures. (Pet. Br. at 36-38, 41.) This argument fails for numerous reasons.

First, the legislative history the State submits as evidence that "the General Assembly adopted the badge requirement in direct response to actual evidence of fraud and the State's then-inability to do anything about it," (Pet. Br. at 37), exemplifies the non-existent link between the badge requirement and the isolated incidents of fraud in the circulation process. Colorado House Representative Fleming

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[20] Respondent Jon Baraga testified that the badge requirement makes it is more difficult to obtain volunteer circulators to collect signatures for the Hemp Initiative because circulators are particularly afraid of retaliation from authorities because of the nature of the issue they support. (T. 1 at 59-60.) Paul Grant, a witness for Respondents, does not believe in wearing a badge and refuses to circulate petitions and risk arrest. (T. 1 at 133.) Respondent Jack Hawkins stated that the cost of printing the badges reduced the amount of money available to pay circulators for soliciting signatures. (T. 1 at 18.)

described an example of fraudulent conduct in which circulators told the petition proponent they had collected 6,000 signatures in excess of what they had actually turned in. (Pet. Br. at 37-38, Pet. App. F-5.) Fleming explained: "That is why we have put in here the process for identifying who the circulators are, have [them] be identified by a name and address so that when indeed there is this attempt to defraud the public out there, we have a way of–of prosecuting these individuals." (*Id.*)

The badge requirement does *nothing* to cure the type of problem Fleming identified. Moreover, a name tag will provide *no* assistance in finding the source of a forged signature. On the other hand, the affidavit requirement[21] cures all of these concerns: because the affidavit includes the name and address of the submitting circulator and is attached to each group of signatures submitted, circulators who submit forged or deficient signatures can now easily be located.

Second, the State would have to come forward with more than the vague hearsay it presented, which the district court appropriately dismissed as "anecdotal," (Pet. App. B-20), to support this burden on political expression. In any event, it is unclear what legitimate complaints the State seeks to monitor using the badges. Blatant falsehoods are minimized and remedied by regulations that ensure electors numerous opportunities to examine the title and text of each ballot measure before voting day.[22] A complaint that a

[21] *See supra* at 16 and n. 14.

[22] Pursuant to § 1-40-110, the initiative title appears on each page of the petition, accompanied by language instructing the potential signer to read the measure in its entirety before signing. Moreover, the director of research of the legislative council of the general assembly is required to publish the title and text of each measure being submitted to the people at least once in every legal newspaper. §1-40-124. The director must also prepare ballot information booklets, which are distributed to the residence of every registered voter in the state before election day. §1-40-124.5. In addition, each political subdivision is required to mail more specific election-day information to all registered voters, including the election date, hours, ballot title, and ballot text. § 1-40-125. Finally, the initiative title appears on the ballot on election day. §1-40-115.

circulator "offended" someone, for example, does not give rise to a compelling State interest in requiring circulators to wear badges. Indeed, there are people who might be offended merely by being asked to sign a petition in support of the Hemp Initiative, and the State cannot burden speech to eliminate this type of complaint. A report that a circulator "mischaracterized" an initiative could mean nothing more than a person disagrees with the circulator as to what the effect of the change in law would be.

This Court has long recognized that risks of this nature are worth taking to ensure the free exchange of ideas. As the Court in *McIntyre* explained:

> The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. *See Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting).

514 U.S. at 357. *See also Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) ("To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.")

Third, the badge requirement is over-inclusive in that *all* circulators--and not only those who have engaged in conduct the State or someone else deems unpalatable -- are required to wear a badge *all* the time. *See McIntyre*, 514 U.S. at 352. On the other hand, the badge requirement is under-inclusive because it does not apply to circulators of *candidate* petitions, or to any other petition circulators. (T. 1

at 115.) This duplicity in Colorado's election statutory scheme belies the State's asserted interest and reveals the badge requirement to be an unnecessary burden on the initiative and referendum process.

Fourth, the State offers no reason the police cannot investigate and prosecute an allegedly harassing circulator just as they would any other allegedly unruly citizen. Indeed, the State presented no evidence of any instance in which a circulator engaged in unlawful conduct on the street that went unpunished. In *Schaumburg* the Court recognized the deficiency of similar reasons for burdening speech:

> 'Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient [than others that restrict speech], the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.' *Schneider v. State*, 308 U.S. 147, 164 (1939)).

444 U.S. at 639.

If a badge requirement is "necessary" on the evidence presented by the State, then Colorado could constitutionally require homeless people begging for change to wear badges just because some may be bothersome. Anti-abortion protestors could be required to wear identification badges on the chance they might harass a woman entering an abortion clinic. Known white supremacists could be required to wear badges in case they engage in hateful "fighting words" speech. This Court, however, has never countenanced such restrictions on free speech.

Paid/Volunteer Disclosure

If the prejudice against paid circulators that is demonstrated by the State and supporting *amici* is shared by the general public, then the requirement that the badge disclose a circulator's paid status would prejudice voters

against signing his petition. This reason for anonymity was recognized by the Court in *McIntyre*:

> On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," the most effective advocates have sometimes opted for anonymity.

514 U.S. at 342 (citations omitted). The State argues that it is "important for the citizens being asked to sign a petition to be able to know [whether] that person [is] a paid petitioner or a . . .volunteer petitioner," (Pet. Br. at 37), but it suggests no reason *why* this information is "important" aside from the State's own hostility toward paid circulators.

Indeed, the *McIntyre* Court challenged the need for disclosing the name of a viewpoint's supporter on the basis that it provides an added piece of relevant information. It stated:

> Though such a requirement might provide assistance to critics in evaluating the quality and significance of the writing, ... such evaluations are possible -- indeed, perhaps more reliable -- when any bias associated with the author's identity is prescinded.

514 U.S. at 342 n.5.

Disclosure of Paid Circulator's Employer

The requirement that the badge contain the name of a paid circulator's "employer" provides no pertinent information to voters. As supporting *amicus* notes, to reach the signature minimum, initiative proponents often hire

companies that employ professional circulators. (Local Gov'nt. Assocs. Br. at 4-7.) The name of the contracted company, and not the name of the initiative proponent, is the required disclosure under the plain language of the statute. *See* § 1-40-112(2)(b) ("name and telephone number of individual employing the circulator"). Inclusion of the name of this sort of company on the badge tells nothing of relevance to the ballot issue.

For all of these reasons, the badge requirement cannot survive strict scrutiny.[23]

c. The Reporting Requirements

The reporting requirements of § 1-40-121 include two very different components. One component requires proponents to disclose the total amount paid to petition circulators as well as the amount paid per signature. This aspect of the mandatory disclosures was upheld by the district court and the court of appeals, (Pet. App. B-22-23, A-40), and is not before this Court. [24] Thus, *the people of Colorado already have access to the names of proponents and the amount of resources being devoted by them in support of any given ballot measure.*

The other provisions of § 1-40-121 require disclosures pertaining to each individual paid petition circulator, including his name, home address, business address, and the amount paid and owed to him. Judge Matsch correctly found that these disclosures, because they prevent anonymity, present the same risks of "intimidation, harassment and retribution" as the badge requirement, and

[23] The badge requirement also would fail the "ordinary litigation" test because the burden it imposes on speech is "severe" and because the state has failed to show it has a more "important regulatory interest" in identifying circulators by name than any other citizens. *See Timmons*, 117 S.Ct. at 1370.

[24] The district court invalidated the duplicative monthly report disclosures pertaining to proponents and their expenses on the grounds that they were unduly burdensome. (Pet. App. B-24.)

thus also impermissibly deter political expression. (Pet. App. B-23.)[25]

The State suggests three possible reasons for upholding the disclosure requirements in the initiative and referendum context: (1) the reports give "the press and the voters of Colorado a more complete picture of how money is being spent to get a measure on the ballot;" (2) the reports "identif[y] the circulators" so that the public knows "who is circulating for what measures;" and (3) "if a problem arises with a particular circulator," the reports, together with the badge requirement, "allow identification of the circulator and thus permit the Secretary of State to respond to the problem." (Pet. Br. at 44-45.)

Each of the State's asserted concerns is specious. Voters are informed about the amount of money spent by proponents to get a measure on the ballot through the disclosure requirements that remain in place. The added benefit of revealing the names of individual circulators and their income to the public is minimal, if it exists at all. The district court stated it succinctly when it wrote: "What is of interest is the payor, not the payees." (Pet. App. B-23.) *Cf. United States v. National Treasury Employees Union*, 513 U.S. 454, 473 (1995) (Government's interest in assuring that federal officers not misuse or appear to misuse power by accepting compensation for unofficial and nonpolitical writing and speaking activities was not served by applying regulation to lower level employees). Furthermore, the State cites to no evidence of the unspecified "problem" that might be avoided by reporting the circulator's name, home address, business address and income to the Secretary of State, nor

[25] These findings are supported by ample evidence, including individuals' fears of harassment and retaliation. *See, e.g., supra* at n. 20. In addition, Jack Hawkins testified that it took him 2 hours each week to visit circulators and gather information for monthly reports. Although the State characterizes this as a "minimal administrative burden," Hawkins' testimony that "it took time away from what we were trying to do which was to get on the ballot," (T. 1 at 20), shows that it impacted his ability to circulate petitions.

any reason why the affidavit requirement and laws of general application would not address this concern.

The State's suggestion that a circulator's name and address can be disclosed publicly for all purposes because it is already disclosed in the affidavit accompanying petition signatures is simply wrong. The affidavit does not justify disclosures that dramatically increase a circulator's public exposure and that are actually intended to notify "the press" of the circulator's support. *See Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 97 n.14 (1982). Moreover, the State's argument turns the constitutional analysis on its head -- only those burdens on speech that are *necessary* to a compelling interest are permitted. *See, e.g., Bellotti*, 435 U.S. at 786. Therefore, the fact that the affidavit contains some of the very same information as the invalidated provisions weighs *against*, not in favor of, the duplicative disclosure in the reporting requirements.[26]

Finally, the State argues that the reporting requirements in this case are "far less burdensome on First Amendment rights" than those upheld by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). (Pet. Br. at 44.) The regulation at issue in this case differs from the FECA disclosures upheld by *Buckley* in two ways. First, § 1-40-121 requires disclosure of the amounts paid to, not contributed by, petition circulators. Second, these disclosures arise in the context of support for issues rather than candidates. Both differences support the lower courts' invalidation of the reporting requirements.

The State claims that "[f]inancial disclosure of contributions far more implicates associational rights than

[26] The State cites *Uphaus v. Wyman*, 360 U.S. 72 (1959) for the proposition that "a person has no basis to make a constitutional challenge to the forced disclosure of information that is already public." (Pet. Br. at 43.) To the contrary, the *Uphaus* Court balanced competing interests and found that New Hampshire's interest in avoiding overthrow of the state government by communists was compelling enough to outweigh the individuals' "interest in associational privacy." 360 U.S. at 78, 81.

the disclosure of how much someone gets paid for doing the job of collecting signatures." (Pet. Br. at 44.) To the contrary, the Court in *Brown v. Socialist Workers* recognized that disclosure of *disbursements to* supporters of a controversial group pose the same risks of harassment -- and thus deter speech in the same way -- as disclosure of contributions by its supporters. *See* 459 U.S. at 96-98.

Furthermore, the state has never explained why disclosure of the money paid to individual circulators on an issue referendum bears any relationship to the risks that led the Court in *Buckley* to uphold FECA's reporting requirements. *See Buckley,* 424 U.S. at 26-27, 67, 68. First, since the petition circulator is advocating an issue rather than a candidate, there is no threat of a *quid pro quo* arrangement arising between the signer and the circulator or the signer and the proponent of the measure. *See Bellotti,* 435 U.S. at 790 ("The risk of corruption perceived in cases involving candidate elections, simply is not present in a popular vote on a public issue.") (citations omitted). Second, the issue advocated in a petition speaks for itself, so there is no need to predict the measure's future "performance" or its place within the political spectrum. Lastly, disclosure of circulators' incomes is unnecessary to monitor compliance with contribution limitations because money paid to circulators is not a contribution, and, in any event, there are no contribution or expenditure limits in the arena of initiatives and referenda. *See City of Berkeley*, 454 U.S. at 299-300. Thus, like the unnecessary burdens imposed by the badge and registration requirements, the disclosure requirements fail strict scrutiny.[27]

[27] The reporting requirements would nevertheless fail the "ordinary litigation" test because they are neither "reasonable" nor "nondiscriminatory." *Timmons*, 117 S.Ct. at 1370. The State's interests in educating voters and preventing fraud are not in any reasonable way served by disclosing the name, home address, business address and income of individual circulators. Thus, these regulations do not outweigh even a slight burden on speech. The disclosure requirements also discriminate in that they apply only to paid, and not to volunteer, circulators.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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